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Nos. 93-607 and ~~93-6639~~

In the Supreme Court of the United States

OCTOBER TERM, 1993

NATHANIEL WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY MEDINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the drug conspiracy and telephone facilitation counts against petitioner Medina were barred by the Double Jeopardy Clause because of his previous conviction for possession of cocaine with intent to distribute it.

2. Whether the district court erred in refusing to grant immunity for prospective defense witnesses.

3. Whether, in sentencing petitioner Medina, the district court incorrectly held him accountable for a quantity of cocaine that petitioner told an undercover agent was awaiting delivery in Mexico.

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NATHANIEL WILSON, PETITIONER

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A41)[1] is reported at 992 F.2d 573.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1993. Petitions for rehearing were denied on July 27,

[1] References are to the appendix in No. 93-607.

1993. Pet. App. A42. The petition for a writ of certiorari in No. 93-607 was filed on October 18, 1993, and the petition in No. 93-6639 was filed on October 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner Medina was convicted on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, two counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and five counts of using a telephone to facilitate a drug trafficking offense, in violation of 21 U.S.C. 843(b). Petitioner Wilson was convicted on the conspiracy count, one of the possession counts, and one count of using a firearm to facilitate drug trafficking, in violation of 18 U.S.C. 924(c). Medina was sentenced to 360 months' imprisonment. C.A. App. 58-59. Wilson was sentenced to 420 months' imprisonment. C.A. App. 64-65. The court of appeals vacated Wilson's sentence and remanded for resentencing. In all other respects, the court of appeals affirmed. Pet. App. A1-A41.

1. The evidence at trial showed that, beginning in 1983, Edward Hanserd and his associates distributed cocaine and other controlled substances in the Detroit area. Wilson was one of Hanserd's associates. Medina and co-defendant Neville King began to supply cocaine to the organization from California in 1987. Pet. App. A2-A3.

In 1987, Wilson sent Fred and June Jackson to California to purchase cocaine. At Wilson's direction, they contacted Hanserd, who was in California. Hanserd introduced them to Medina, and the Jacksons ultimately purchased large quantities of cocaine from King. In early 1988, the Jacksons again went to California to purchase cocaine from King and Medina with money supplied by Wilson. Pet. App. A3.

Later in January 1988, Hanserd purchased a multi-kilogram quantity of cocaine from Medina and King. Once it reached Detroit, the cocaine was turned over to Wilson. In March 1988, Hanserd purchased an additional 47 kilograms of cocaine from Medina and paid him $647,000. Hanserd transported the cocaine from California to Detroit, where he sold 31 of the kilograms to Wilson. Also in 1988, Kenneth Echavarria, acting at the behest of Medina, twice delivered a half kilogram of heroin to Hanserd. One of the deliveries of heroin was made in Wilson's car. Pet. App. A3.

In December 1986, Detroit police officers seized approximately $167,000 in cash from Wilson's residence. One year later, Wilson was stopped while driving a BMW registered to Hanserd's grandmother. He was found in possession of cocaine, two handguns, and an airline ticket stub showing a round trip between California and Detroit. In early 1988, Louisiana police stopped Hanserd and Medina and found approximately $197,000 in cash in their possession. In May 1988, police seized approximately $233,000 in cash from Medina and King. And, in June 1990, Medina was arrested after attempting to sell three kilograms of cocaine to California law enforcement officers and Paris Pettiford, a member of the Hanserd organization who was cooperating with the government. In all, Hanserd and his associates sold approximately a kilogram of cocaine a day over at least a two-year period. Pet. App. A4.

2. In an earlier federal proceeding in the Central District of California, Medina was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). That conviction resulted from a sting operation in which Paris Pettiford, one of Hanserd's associates, negotiated over the telephone with Medina for the purchase of cocaine, leading to the sale of cocaine by Medina to government agents in June 1990. The tapes of the telephone conversations between Medina and Pettiford were introduced at Medina's trial in

California as evidence of Medina's intent to distribute cocaine. The conspiracy charge in the instant case specifically referred to the 1990 drug sale. The counts charging improper use of a telephone referred to the five telephone conversations between Pettiford and Medina. Pet. App. A27-A28. Prior to trial in this case, Medina unsuccessfully moved to dismiss the conspiracy and telephone facilitation counts on double jeopardy grounds, based on his previous conviction in California.

3. Although the government argued at sentencing that Medina was accountable for thousands of kilograms of cocaine, it asked the district court to assign him a base offense level based on at least 500 but less than 1,500 kilograms of cocaine. C.A. App. 1907-1908. Among the quantities of cocaine that the government argued should be attributed to Medina were 500 kilograms that Medina had told one of the undercover agents he had in Mexico awaiting delivery. *Id.* at 1907. Medina's counsel argued that the 500 kilograms should not be considered, because Medina's statement to the agent was mere "puffing." *Id.* at 1902. The district court concluded that Medina was accountable for "a minimum of 500 kilos." *Id.* at 1921. The only comment the court made touching on the 500 kilograms in Mexico was, "You might argue as puffing, but there's a lot more in there, counsel, th[a]n his puffing." *Id.* at 1922. Thereafter, at Wilson's sentencing, the district court found Wilson accountable for the total quantity of drugs in the conspiracy, including the 500 kilograms that Medina discussed with the government agent. Pet. App. A33.

4. a. On appeal, both petitioners contended that the district court erred by refusing either to grant judicial immunity or to compel the government to request immunity for potential defense witnesses Edward Hanserd and Dion Childress, who had earlier pleaded guilty. Pet. App. A22. The court of appeals held that it had no authority to grant judicial immu-

nity. *Id.* at A23. The court acknowledged that other circuits have held that a prosecutor's refusal to request immunity for a defense witness might violate the Due Process Clause under certain circumstances. *Ibid.* However, the court "declin[ed] the invitation to recognize the theory here, particularly when the defendants have made no showing that the government acted affirmatively to prevent testimony of defense witnesses." *Ibid.*

b. Petitioner Medina contended that his prosecution for conspiracy and using a telephone to facilitate drug trafficking was barred by the Double Jeopardy Clause because of his previous conviction for possessing cocaine with intent to distribute it. The court of appeals held that Medina's prosecution for conspiracy was proper, even though the earlier possession offense was alleged as part of the conspiracy, because a substantive crime and a conspiracy to commit that crime are not the "same offense" for double jeopardy purposes. Pet. App. A28. The court of appeals also found no merit in Medina's claim that the Section 843(b) counts were barred by the Double Jeopardy Clause, stating that "the government has not relied upon Medina's earlier conviction for possession with intent to distribute cocaine in proving Medina used a communication facility in violation of Section 843(b)" and that the government had not "rel[ied] on conduct that constituted an offense for which [Medina] has been convicted." Pet. App. A29-A30.

c. Finally, both petitioners contended that, in determining for purposes of sentencing that they were accountable for at least 500 kilograms of cocaine, the district court improperly considered Medina's statement that he had a 500-kilogram shipment of cocaine in Mexico awaiting delivery. The court of appeals concluded that the district court's determination that Medina should be sentenced based on a total of at least 500 kilgrams of cocaine was not "clearly erroneous."

Pet. App. A33. The court added that, in light of Medina's role as a major supplier of drugs for the Hanserd organization, "[he] could be found to have had the intent and capability to deliver on his statements regarding a large cocaine shipment." *Ibid.* With respect to Wilson, however, the court of appeals found that the district court had failed to make any finding that he could "reasonabl[y] foresee[ ]" the 500 kilogram shipment. *Id.* at A33-A34. Accordingly, the court vacated Wilson's sentence and remanded for findings on that issue. *Id.* at A34.

5. Judge Merritt dissented from the court's holding that the Double Jeopardy Clause did not bar prosecution of Medina for use of the telephone to facilitate a drug transaction. Pet. App. A39-A41. In Judge Merritt's view, "[w]hen telephone calls produce an alleged drug transaction, the government should not be allowed successively to prosecute the defendant for the telephone part of the offense after the defendant is convicted or acquitted of the drug offense underlying the use of the phone." *Id.* at A39.

ARGUMENT

1. Petitioner Medina contends (Pet. 8-9) that his prosecution for drug conspiracy and telephone facilitation was barred by the Double Jeopardy Clause because of his previous conviction for possessing cocaine with intent to distribute it. The court of appeals correctly rejected that contention.

a. Medina argues that the Double Jeopardy Clause foreclosed the conspiracy charge because the substantive drug offense for which he was previously convicted was alleged as part of the conspiracy and proved at trial. The applicable test for determining whether two offenses are separate offenses for double jeopardy purposes is that set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)—*i.e.*, whether

each offense contains an element not required by the other. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). A substantive offense such as possession of cocaine with intent to distribute it contains an element not contained by a conspiracy offense—actual commission of the substantive crime. Likewise, a conspiracy offense contains an element not contained by the underlying substantive offense—an agreement among two or more people to commit the substantive crime. Accordingly, as this Court has frequently recognized, "a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes." *United States* v. *Felix*, 112 S. Ct. 1377, 1384 (1992). See also *Garrett* v. *United States*, 471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 777-779 (1975); *United States* v. *Bayer*, 331 U.S. 532, 542 (1947).[2]

b. Nor is Medina's prosecution on the telephone facilitation counts barred by the Double Jeopardy Clause. Medina was previously prosecuted for possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). C.A. App. 459. In this case, he was prosecuted for a violation of 21 U.S.C. 843(b), which makes it illegal to use a communication facility "in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of [subchapters I and II of Chapter 13 of Title 21]."

The courts of appeals have generally held that proof of a violation of Section 843(b) requires proof that one of the predicate Title 21 offenses was also committed. See, *e.g.*, *United States* v. *Dotson*, 895 F.2d 263, 264 (6th Cir.), cert. denied, 498 U.S. 831 (1990); *United States* v. *Mims*, 812

[2] Although Medina does not expressly cite *Grady* v. *Corbin*, 495 U.S. 508 (1990), he appears to rely (Pet. 8-9) on the "same conduct" test set forth in that decision. *Grady*, however, was overruled in *United States* v. *Dixon*, 113 S. Ct. at 2860.

F.2d 1068, 1077 (8th Cir. 1987); *United States* v. *Jefferson*, 714 F.2d 689, 699 (7th Cir. 1983); *United States* v. *Rey*, 641 F.2d 222, 224 n.6 (5th Cir.), cert. denied, 454 U.S. 861 (1981); cf. *United States* v. *Powell*, 469 U.S. 57, 60 n.4 (1984). The predicate offense, however, may be an inchoate offense, such as attempt or conspiracy. See, *e.g.*, *United States* v. *Mims*, 812 F.2d at 1077; *United States* v. *Rey*, 641 F.2d at 224 n.6; *United States* v. *Thomas*, 586 F.2d 123, 130-131 (9th Cir. 1978); *United States* v. *Pierorazio*, 578 F.2d 48, 51 (3d Cir.), cert. denied, 439 U.S. 981 (1978).

In this case, the indictment charged that the predicate offense element of the telephone solicitation counts could be established by proof of an attempted violation of 21 U.S.C. 841, which is a violation of 21 U.S.C. 846. Specifically, each of the telephone solicitation counts against Medina alleged that he

> did knowingly, intentionally and unlawfully utilize a communication facility, that is a telephone, in committing, attempting to commit, and facilitating the commission of acts constituting a felony under Title 21, United States Code, Section 841.

C.A. App. 54-56. The indictment thus alleged that Medina violated 21 U.S.C. 843(b) by using a telephone "in committing, [or] *attempting to commit* * * * acts constituting a felony under [21 U.S.C. 841]." That was the theory on which the case was tried and submitted to the jury.[3] As the court charged

[3] To be sure, the indictment was inartfully drafted. To be precisely congruent with the statute, the indictment should have charged that Medina used a telephone "in facilitating the commission or attempted commission of an act constituting a violation of Section 841" or a similar formulation. In substance, however, the language of the indictment—use of the telephone "in committing [or] attempting to commit * * * acts constituting a felony under [21 U.S.C. 841]"—was equivalent to that language and fully adequate to put Medina on notice as to the offense with which he was charged.

the jury, "the government must prove * * * that the defendant * * * used a telephone with the intent to help to bring about or attempt to bring about a transaction involving Cocaine." C.A. App. 1834.[4]

Section 843(b) and Section 841(a)(1) do not charge "the same offense" for purposes of the Double Jeopardy Clause. In order to prove a violation of Section 841(a)(1), the government must prove that the defendant possessed drugs with intent to distribute them, but not that he used the telephone to facilitate that conduct. In order to prove a violation of Section 843(b), the government must prove that the defendant used the telephone, but not that he committed or aided and abetted the commission of a completed substantive violation of Section 841(a)(1). It is enough for the government to prove that an inchoate drug offense, such as conspiracy or (as charged here) attempt, was committed and facilitated by the use of the telephone. While the proof at trial in this case also showed that a substantive violation of Section 841(a)(1) was committed, proof of that violation was not a necessary element of a violation of Section 843(b). Accordingly, the Section 843(b) offenses with which petitioner was charged satisfied the *Blockburger* test vis-a-vis the Section 841(a)(1) charge of which he was previously convicted; petitioner's prosecution for the Section 843(b) offenses therefore was not barred by the Double Jeopardy Clause.

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[4] In closing argument (23 Tr. 3270) the prosecutor noted

> that we don't have to show that any of these telephone conversations resulted in actual transfer of drugs, but they have to show there was an attempt, some facilitation of drug trafficking activity and the use of the telephones.

He also argued (23 Tr. 3293) that

> [w]ith regard to the telephone counts, the evidence is clear that the individuals on the other end of the phone, John Barrett and Tony Medina, were attempting to negotiate drug deals in each one of those telephone conversations [a]s charged in the Indictment.

The analysis of the separate prosecutions in this case is analogous to the analysis embraced by this Court in *United States* v. *Dixon*, *supra*. As Justice Scalia, joined by Justice Kennedy, noted, the defendant was first prosecuted for contempt of court. In the context presented in *Dixon*, Justice Scalia viewed that offense as requiring the government to prove knowledge of a court order and simple assault or threats. 113 S. Ct. at 2858. But the earlier prosecution for contempt in *Dixon* did not bar the defendant's later prosecution on charges of assault with intent to kill or threats to injure or kidnap. The contempt charge (which corresponds to the telephone facilitation charge in this case) required proof of knowledge of a court order (corresponding to Medina's use of the telephone), which the later charges did not. The later charges in *Dixon* (which correspond to Medina's Section 841(a)(1) prosecution), required proof of intent to kill or threats to injure or kidnap (corresponding to proof of Medina's completed possession of cocaine with intent to distribute it), which were not required for proof of the contempt charges. *Id.* at 2858-2859. Under that analysis, with which the three concurring Justices agreed, 113 S. Ct. at 2868 n.3 (Rehnquist, C.J., joined by O'Connor, J., and Thomas, J., concurring in part and dissenting in part), there was no double jeopardy bar to prosecution of petitioner on the telephone facilitation counts.[5]

2. Both petitioners contend (93-607 Pet. 12-20; 93-6639 Pet. 9-12) that the district court either should have granted

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[5] In any event, petitioner's double jeopardy challenge to his Section 843(b) convictions would appear to have no practical impact on his sentence. Petitioner was sentenced to 360 months' imprisonment on the conspiracy count, 235 months' imprisonment on two counts charging possession of cocaine with intent to distribute it in January and March, 1988, and 48-month sentences on the Section 843(b) counts. All sentences were set to run concurrently with each other. C.A. App. 59.

"judicial" immunity to Hanserd and Childress or should have ordered the government to grant them statutory immunity. The court of appeals correctly rejected that claim.

a. The district court did not have authority to immunize Hanserd and Childress. As this Court has recognized, the federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to grant immunity in the Executive Branch. Accordingly "only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); see also *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984). Following this Court's lead, the great majority of the courts of appeals have held that a federal court may not immunize defense witnesses without a request from the prosecution. See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976).

In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980), decided before this Court's decisions in *Conboy* and *Doe*, the Third Circuit held that district courts have authority to grant "judicial" immunity even in the absence of a request from the prosecution. The Third Circuit has not had occasion since this Court's decisions in *Doe* and *Conboy* to reconsider its ruling in *Smith*, and the continued vitality of that decision is thus uncertain. But even assuming

that *Smith* retains vitality, petitioners would not be entitled to immunity for Hanserd or Childress under the analysis adopted in that case.

The Third Circuit in *Smith* narrowly limited the scope of its rule:

> [I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.

615 F.2d at 972. In addition, in order to justify a grant of judicial immunity, the evidence sought by the defense must rise to the level that, if admitted, there is little doubt that the testimony would produce an acquittal. *United States* v. *Lowell*, 649 F.2d 950, 964-965 (3d Cir. 1981).

Petitioner's case does not satisfy that standard. In the first place, it is highly unlikely that Hanserd's or Childress's testimony would have produced acquittals. According to petitioners, Hanserd would have testified that he did not receive drugs from Medina and that his only dealings with Wilson were legitimate business transactions. However, five other witnesses who were participants in the Hanserd organization testified to the contrary. Further, the government introduced evidence that in 1986 Detroit police officers seized $186,000 from Wilson's residence; that in 1987 they stopped Wilson while he was driving a BMW registered to Hanserd's grandmother and found him in possession of cocaine, guns, and an airline ticket stub showing a round trip between California and Detroit; that in 1988 Louisiana police stopped Hanserd and Medina and found approximately $197,000 in their possession; that in the same year they seized $233,000 from Medina and King; and that in 1990 Medina was arrested

trying to sell three kilograms of cocaine to an undercover officer and Paris Pettiford, a member of the Hanserd organization. In light of the above evidence, there was certainly more than a "little doubt" that Hanserd's testimony would produce acquittals.

As for Childress, petitioners allege that he would have testified that he never met Medina and that he knew of no drug dealing between Hanserd and Wilson. Such testimony would not have been significantly exculpatory; as the court of appeals noted, see Pet. App. A24, in a conspiracy it is often the case that some members are not aware of the identity or participation of other members.

There were, moreover, substantial government interests militating against grants of immunity. Hanserd and Childress had entered guilty pleas in this case, and at the time of petitioners' trial they were still awaiting sentence. At sentencing, the district court expected to take evidence and make determinations concerning both the amount of drugs for which Hanserd and Childress were accountable and their respective roles in the conspiracy. C.A. App. 1754-1755. There was therefore a real possibility that grants of immunity would affect ongoing prosecutions. Indeed, the district court's denial of petitioners' motions for defense witness immunity rested in large part on that basis. *Ibid.* Additionally, at the time of trial Hanserd was attempting to withdraw his guilty plea and proceed to trial, which was the primary reason he asserted for invoking his Fifth Amendment privilege. C.A. App. 1800. That provided an additional reason to refuse a grant of immunity that could have jeopardized the government's ability to try Hanserd if he had been permitted to withdraw his guilty plea.

b. The district court also was not required to order the government to seek statutory immunity for Hanserd and

Childress. Even in circuits that regard such a course as permissible under 18 U.S.C. 6001 *et seq.*, a district court may take such action in only two circumstances: where government intimidation causes a defense witness to invoke his Fifth Amendment privilege and refuse to give testimony that otherwise would have been available to the defense, and where the government withholds immunity from a defense witness for the sole purpose of keeping exculpatory evidence from the jury. See, *e.g.*, *United States* v. *Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1191-1192 (1st Cir.), cert. denied, 498 U.S. 845 (1990); *United States* v. *Hooks*, 848 F.2d at 799; *United States* v. *Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983); *United States* v. *Lord*, 711 F.2d 887, 890-891 (9th Cir. 1983).

Neither of those circumstances obtains here. The court of appeals explicitly found that the government did not intimidate Hanserd or Childress or otherwise act affirmatively to prevent them from testifying, Pet. App. A23, and petitioners do not contest that finding. Nor was the government's refusal to grant immunity to Hanserd and Childress without valid justification. As discussed above, Hanserd and Childress were still awaiting sentence at the time of petitioners' trial, and Hanserd was attempting to withdraw his guilty plea and proceed to trial. Accordingly, there was legitimate concern that grants of immunity could affect continuing prosecutions.[6]

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[6] In *United States* v. *Westerdahl*, *supra*, which petitioners cite in their support, a government witness testified as part of a plea bargain that the defendant had confessed to the charged offense. At the same time, the government denied immunity to a defense witness who would have directly contradicted the government witness by testifying that the defendant did not commit the offense. In those circumstances, the court of appeals remanded for a determination whether the government "intentionally" distorted the fact-finding process by denying immunity to the

3. Medina contends (Pet. 12-15) that, in holding him accountable for at least 500 kilograms of cocaine, the district court improperly included the 500 kilograms that he told an undercover agent he had in Mexico.

Medina's assertion that the district court included the 500 kilograms mentioned to the undercover agent is not supported by the record. The court's only comment relative to the 500 kilograms was, "You might argue as puffing, but there's a lot more in there, counsel, th[a]n puffing." C.A. App. 1922. We read that statement to mean that, even disregarding the 500 kilograms mentioned to the agent, there was enough evidence to sentence Medina based on at least 500 kilograms of cocaine. At co-defendant King's sentencing only two weeks after Medina's, the district court explicitly confirmed the correctness of that reading. On that occasion, the court explained that it had not been "necessary [at Medina's sentencing] to specifically address [Medina's accountability for the 500 kilograms]," because "[w]e were well over 500 in terms of his conduct and what he was responsible for." C.A. App. 2061-2062.

In any event, the district court could properly have held Medina accountable for the 500 kilograms of cocaine mentioned to the agent. In order to increase a defendant's sentence based on so-called "conversational cocaine," the court

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defense witness. *Id.* at 1087. *Westerdahl* does not help petitioners, however, because here, as we have shown, there were legitimate reasons why immunity should not be granted.

Nor are petitioners helped by the decisions of this Court cited by Wilson (93-607 Pet. 18) concerning the Sixth Amendment right to compulsory process. Those decisions do not suggest that the Compulsory Process Clause establishes "a right to supersede a witness' invocation of his own fifth amendment privilege or the right to demand that the government shield a witness from the consequences of his own testimony." *United States* v. *Chagra*, 669 F.2d 241, 260 (5th Cir.), cert. denied, 459 U.S. 846 (1982).

must find that the defendant intended to produce and was reasonably capable of producing the stated amount. Sentencing Guidelines § 2D1.4, Application Note 1 (1991). See, *e.g.*, *United States* v. *Gessa*, 971 F.2d 1257, 1265 (6th Cir. 1992) (en banc); *United States* v. *Monroe*, 943 F.2d 1007, 1018-1019 (9th Cir. 1991), cert. denied, 112 S. Ct. 1585 (1992). Here, the court of appeals correctly held, Pet. App. A33, that, given Medina's role as a major cocaine supplier to the Hanserd organization, he could be found to have had the intent and ability to deliver on his statements regarding the shipment of cocaine.[7]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Of course, the district court made no findings at Medina's sentencing concerning Medina's intention to produce and capability of producing the cocaine because, as we have shown, the court did not rely on that cocaine in order to find that Medina was accountable for at least 500 kilograms. However, the court did make the requisite findings concerning Medina's intention and capability at co-defendant King's sentencing two weeks later. C.A. App. 2062. Accordingly, even if the court had held Medina accountable for the Mexican cocaine, there would be no point to a remand for additional findings on that issue.

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